Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

STATE OF LOUISIANA,
through the Department of Transportation
and Development,

Petitioner,

v.

JAMES W. LONG, Individually and on behalf of his minor son, CHRISTOPHER W. LONG, and JAMIE LONG COLEY,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of Louisiana, Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The present suit stems from a collision that occurred between an automobile and a train at the Harp Street railroad-grade crossing in Morehouse Parish, Louisiana. The Harp Street railroad-grade crossing is not owned or under the care, custody, or control of the State of Louisiana, Department of Transportation and Development and does not form part of the State Highway System as set forth under La. R.S. 48:191. It is an off-system crossing. Pursuant to La. R.S. 48:757, the State of Louisiana, Department of Transportation and Development is prohibited from performing maintenance on non-state roadways. The sole basis of the State of Louisiana, Department of Transportation and Development's knowledge of the off-system Harp Street crossing is pursuant to the State's participation in the Federal-Aid Highway Program, 23 U.S.C. § 130.

A. Whether correspondence between the Village of Bonita and the State of Louisiana, Department of Transportation and Development concerning the upgrade of a non-state highway/railroad grade crossing solely pursuant to the Federal Aid Highway Program, 23 U.S.C. § 130 is protected from admission into evidence by 23 U.S.C. § 409.

B. Whether the State of Louisiana, Department of Transportation and Development's review and survey of the off-system Harp Street crossing pursuant to 23 U.S.C. § 130 imposes a duty on the State to assume control and custody of the Harp Street crossing when no such duty exists under Louisiana law or Federal law.

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

This petition for a writ of certiorari is filed on behalf of the State of Louisiana, through the Department of Transportation thus the corporate disclosure statement required by Rule 29.6 is inapplicable.

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OPINIONS BELOW

The December 17, 1999, denial of petitioner's writ of certiorari by the Supreme Court of Louisiana is reported at 99-2956 (La. 12/17/99), ___ So.2d ___, 1999 WL 1286216 (La. Dec. 17, 1999), and is attached at Appendix E to this petition, p. App. 21. The September 16, 1999, denial of rehearing by the Louisiana Court of Appeal, Second Circuit is unreported and is reprinted at Appendix C to this petition, p. App. 17. The August 18, 1999, opinion of the Louisiana Court of Appeal, Second Circuit is reported at 32,124 (La.App. 2 Cir. 8/18/99), 743 So.2d 743, *rehearing denied* (Sep. 16, 1999) and is reprinted at Appendix A to this petition, p. App. 1. The September 18, 1998, judgment of the Fourth Judicial District Court, Parish of Morehouse, State of Louisiana is unreported and is reprinted at Appendix B to this petition, p. App. 15.

STATEMENT OF JURISDICITON

The denial of petitioner's writ of certiorari by the Supreme Court of Louisiana was rendered on December 17, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

A. *FEDERAL STATUTES*

23 U.S.C. § 409. Discovery and admission as evidence of certain reports and surveys

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of indentifying evaluating, or planning the safety enhancement of potential accident sites, hazardous

roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

23 U.S.C. § 130. Railway-highway crossings

(d) Survey and schedule of projects. – Each State shall conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose. At a minimum, such a schedule shall provide signs for all railway-highway crossings.

(The full text of 23 U.S.C. § 130 is reprinted at Appendix F to this petition, p. App. 22.)

23 U.S.C. § 109(e)

(e) No funds shall be approved for expenditure on any Federal-aid highway, or highway affected under chapter 2 of this title, unless proper safety protective devices complying with safety standards determined by the Secretary at that time as being adequate shall be installed or be in operation at any highway and railroad grade crossing or drawbridge on that portion of the highway with respect to which such expenditures are to be made.

B. *LOUISIANA STATUTES*

La. R.S. 48:757. Off-system work; prohibitions; exceptions

A. (1) The Department of Transportation and Development shall perform no work on the parish road system or on any other roads or streets which are not in the state highway system, whether such work is construction or maintenance and whether the work is done at the expense of the state or at the expense of the governing authority of the parishes, except in the following circumstances:

(The full text of LA-R.S. 48:757 is reprinted at Appendix G to this petition, p. App. 27.)

La. R.S. 48:191. State highway System; length; designation

A. There is hereby created and established a system of state highways which shall consist of twelve functional classifications as follows:

(1) Urban highways described as:

(a) Urban-principal arterial-interstate.

(b) Urban-principal arterial-other freeways and expressways.

(c) Urban-principal arterial-other.

(d) Urban-minor arterial.

(e) Urban-collector.

(f) Urban-local.

(2) Rural highways described as:

(a) Rural-principal arterial-interstate.

(b) Rural-principal arterial-other.

(c) Rural-minor arterial.

(d) Rural-major collector.

(e) Rural-minor collector.

(f) Rural-local.

B. The total length of the twelve functional systems shall not exceed sixteen thousand six

hundred seventy-five miles, and the additional length permitted herein is allowed solely for the purpose of adjustments that might become necessary from time to time within the sole discretion of the secretary, working in conjunction with the police juries or municipalities.

C. The location of all highways in the functional systems established hereby may be altered and amended by the secretary to such an extent and in such a manner as may be necessary for the purpose of meeting any requirements in order to obtain federal aid for road construction in Louisiana. The system of state highways created hereby shall consist of the above twelve functional systems and the department shall maintain its current description in conformance with the same.

STATEMENT OF THE CASE

This action arises out of a motor vehicle/train accident that occurred in Morehouse Parish, Louisiana, on September 10, 1997, at the intersection of Harp Street and the Union Pacific railroad tracks. Plaintiffs filed suit against the State of Louisiana, through the Department of Transportation and Development (DOTD) and copied correspondence (3 letters) in their petition for damages concerning the potential upgrade of the non-state route railroad-grade crossing with the use of federal funds pursuant to the Federal Safety Program. The first letter from Mayor Lytle of the Village of Bonita to Bill Shrewsberry of DOTD on May 18, 1995, reads as follows: p. App. 3.

Dear Mr. Shrewsberry:

On May 12, 1995, there was (sic) an fatal accident at (sic) an railroad grade crossing in Bonita.

The grade crossing is unmarked except for wooden crossbucks. Mr. David Peterson of the Union Pacific RR informs me that your office is in charge of determining whether warning lights or gates are needed at grade crossings. There have been two previous accidents at this crossing, one with a fatality in the last eight years. I believe that some additional warning is needed at this crossing and am requesting an on-site review of the situation by your office.

Sincerely,

/s/

Michael J. Lytle, Mayor
Village of Bonita

The second letter from DOTD to Mayor Lytle, dated September 6, 1995, states: p. App. 3, 4.

Dear Mr. Lytle:

Under the above referenced project, the Department plans to signalize the railroad crossing from funds available through a federal safety program. In order to comply with Federal Highway Administration requirements, the local governing body must agree by letter or resolution to maintain both pavement striping and signs.

Please see attached sheet copied from Manual of Uniform Traffic Control Devices. There will normally be two signs and two sets of pavement markings to maintain.

Upon receipt of your concurrence, the Department will proceed with the necessary steps to obtain approval from FHWA to complete the project.

Very truly yours,

/s/

Merlin A. Pistorius
Chief, Maintenance Division

The third letter from Mayor Lytle to DOTD, dated September 13, 1995, states: p. App. 4, 5.

> Dear Mr. Pistorius:
>
> We were happy to receive your letter of September 6, 1995, stating your intention to signalize the above referenced railroad crossing. We understand our obligation to maintain the pavement striping and signs.
>
> By this letter we agree to maintain the pavement striping and signs.
>
> Sincerely,
> /s/
> Michael J. Lytle, Mayor
> Village of Bonita

DOTD filed its Motion to Strike the three letters plaintiffs copied in their petition on the basis that the correspondence was inadmissible pursuant to 23 U.S.C. § 409 because the letters reflected information and recommendations concerning the upgrade of the Harp Street crossing pursuant to the Federal Safety Program as set forth under 23 U.S.C. § 130. DOTD also filed its Motion for Summary Judgment on the basis that the Harp Street crossing was not part of the State Highway System as enumerated under La. R.S. 48:191 and that DOTD was and is prohibited under La. R.S. 48:757 from performing maintenance on roadways and/or railroad-grade crossings that do not form part of the State Highway System. DOTD additionally argued and proved that the sole basis of its knowledge of the Harp Street crossing was pursuant to the Federal Railroad Safety Program (FRSP) as set forth under 23 U.S.C. § 130. Furthermore, it was argued that the FRSP does not impose a duty on DOTD to maintain or upgrade the off-system Harp Street crossing,

nor does it preempt state law prohibiting DOTD from maintaining off-system crossings.

In support of DOTD's Motion for Summary Judgment and Motion to Strike, DOTD submitted the affidavits of Steven L. Cumbaa and William C. Shrewsberry, Jr. The affidavit of William C. Shrewsberry, Jr., the licensed civil engineer employed by the Louisiana Department of Transportation and Development, who is charged with the administration of the Federal Railroad Safety Program, established pursuant to the requirements of 23 U.S.C. § 130 stated in part:

> He has also determined that the only reason why DOTD would compile or collect information on the Harp Street railroad crossing is because of the State's participation in the Federal Railway Upgrade Safety Program as set forth under 23 U.S.C. § 130.
>
> Outside of the Federal Railroad Safety Program, DOTD would not and does not perform any maintenance, or compile or collect any information on the Harp Street crossing.

The affidavit of Steven L. Cumbaa stated and proved that Harp Street is not part of the state highway system and was not owned or under the care, custody, or control of DOTD. (The fact that Harp Street is not a state highway is not in dispute.)

Plaintiffs did not submit any countervailing affidavit or other forms of admissible evidence to refute DOTD's proof that the sole basis of DOTD's knowledge of the Harp Street crossing was and is pursuant to its participation in the Federal Safety Program. The only evidence submitted by plaintiffs were the three unsworn and unverified letters between the Village of Bonita and DOTD. Based on the evidence before the court, the trial

court granted DOTD's Motion to Strike and Motion for Summary Judgment. p. App. 15.

> The trial court in its minute entry and order stated, "It is further Ordered that defendants motion for summary judgment be – and is – hereby – Granted in that the pervasiveness of the Federal regulatory scheme of the statute in question warrants the same." p. App. 19.

Plaintiffs appealed to the Second Circuit Court of Appeal of Louisiana. On August 18, 1999, the Second Circuit reversed the trial court's rulings on the motion to strike federal safety program information and motion for summary judgment. The court held that the May 18, 1995 letter was protected under 23 U.S.C. § 409 because it informed DOTD that there had been a fatal accident at the crossing. The court reasoned, "That letter, which provides information about several particular events, falls within the prohibition against the admission of (1) data . . . (2) collected (3) for the purpose of identifying . . . the safety enhancement of . . . railway-highway crossings . . . (4) pursuant to 23 U.S.C.A. § 130." *Long* at 748, 749. p. App. 11.

The court further ruled that the September 6, 1995 letter from DOTD and the responsive letter from Mayor Lytle on September 13, 1995 contained no information restricted by the statute and were not protected under 23 U.S.C. § 409. The court in *Long, supra,* reasoned:

> "Although the letter from the DOTD specifies that the federal government is the expected source of funds for the planned improvement, it makes no reference whatsoever to any 'reports, surveys, schedules, lists, or data,' the only items 'expressly proscribed' from admission or discovery. *Palacios, supra; Wiedeman, supra.* These letters are unlike the exhibits in *Reichert* which

> contained reports or data along with information about the DOTD's plans. Further, the letters contain no suggestion that the planned improvement was based on any of the restricted information. We, therefore, distinguish these letters from the contract involved in *Stephens v. Town of Jonesboro*, 25,715 (La. App. 2d Cir. 8/19/94), 642 So.2d 274, which contained "information relating to a highway safety construction improvement." *Long* at 748. p. App. 11.
>
> * * *
>
> "The two letters in the case *sub judice* do not contain or refer to any such safety information." *Long* at 748. p. App. 12.

The court reached this conclusion despite their finding that the sole basis of DOTD's relationship with the subject crossing was grounded in the federal highway-aid program.

The Louisiana Second Circuit Court of Appeal acknowledged:

> "the DOTD's duty here was grounded in the federal highway-aid program, but this alone does not require the exclusion of the letters which do not contain or refer to any of the prohibited material." *Long* at 748. p. App. 11, 12.

DOTD filed its Application for Rehearing En Banc based on the fact that the Second Circuit's ruling in *Long, supra,* was directly contrary to its previous rulings in *Stephens v. Town of Jonesboro,* 25,715 (La. App. 2 Cir. 8/19/94), 642 So.2d 274, *rehearing denied* (La. App. 2 Cir. 9/15/94) *writ denied,* 646 So.2d 400 (La. 11/29/94), *Fry v. Southern Pacific Transportation Co.,* 30546 (La.App. 2 Cir. 6/24/98), 715 So.2d 632, *writ denied,* 98-1986 (La. 10/30/98), 727 So.2d 1170, and was directly contrary to the Louisiana Supreme Court's rulings in *Palacios v.*

Louisiana and Delta Railroad, Inc., et al., 98-2932 (La. 7/2/99), 740 So.2d 95, and *Reichert v. State, Department of Transportation and Development, et al.*, 96-1419 (La. 5/20/97), 694 So.2d 193, *rehearing denied* (La. 6/30/97), concerning the admissibility of information concerning federal safety programs.

DOTD's Application for Rehearing En Banc was denied without reason on September 16, 1999, by a five-judge panel. p. App. 17.

DOTD's application for a writ of certiorari and/or writ of review was denied by the Louisiana Supreme Court on December 17, 1999. p. App. 21.

REASONS FOR GRANTING THE WRIT

The decision of the Louisiana Second Circuit Court of Appeal represents an erroneous and overly restrictive interpretation of federal law, 23 U.S.C. § 409 and an erroneous interpretation of federal law, 23 U.S.C. § 130. The Louisiana Second Circuit Court of Appeal's interpretation of 23 U.S.C. § 409 and 23 U.S.C. § 130 warrants this Court's review on a writ of certiorari pursuant to Rule 10 (b) and (c) of the Supreme Court Rules because the lower court's ruling conflicts with the decisions of other state courts of last resort, decisions of United States Court of Appeals, and United States District Courts. Granting of petitioner's writ of certiorari is also warranted because the Louisiana Second Circuit Court of Appeal's interpretations of 23 U.S.C. § 409 and 23 U.S.C. § 130 decided an important question of federal law that has not been, but should be, settled by this Court.

The Louisiana Second Circuit Court of Appeal is utilizing the State's participation in the Federal-aid highway program pursuant to 23 U.S.C. § 130 as basis to impose a duty and liability upon DOTD to upgrade non-

state highway railroad grade crossings where none exist under the federal statutory scheme or Louisiana law. The Louisiana Second Circuit Court of Appeal is admitting and utilizing the correspondence DOTD develops pursuant to its involvement in 23 U.S.C. § 130 in violation of 23 U.S.C. § 409 as a basis to establish a private cause of action that is not authorized by the statutes.

Lastly, the State's petition for a writ of certiorari should be granted because relief through this Court is the only means by which the State can correct the Louisiana Court's pattern of misinterpreting the federal statutes, 23 U.S.C. § 409 and 23 U.S.C. § 130.

I. Petitioner's writ of certiorari should be granted because the Louisiana Second Circuit Court of Appeal's ruling in *Long* concerning the admissibility of correspondence and recommendations for the upgrade of the non-state highway railroad grade crossing pursuant to 23 U.S.C. § 130 and 23 U.S.C. § 409 is in direct conflict with decisions of the United States Courts of Appeal, United States District Courts, and other states' courts of last resort.

A. The Louisiana Second Circuit Court of Appeal's interpretation of 23 U.S.C. § 409 is overly restrictive and conflicts with the decisions of the United States Court of Appeals' decisions of *Harrison v. Burlington Northern Railroad Company*, 965 F.2d 155 (7th Cir. 1992); *Robertson v. Union Pacific Railroad Company*, 954 F.2d 1433 (8th Cir. 1992); and *Lusby v. Union Pacific Railroad Company*, 4 F.3d 639 (8th Cir. 1993).

In *Harrison v. Burlington Northern Railroad Company*, 965 F.2d 155 (7th Cir. 1992), the United States Court of Appeal held that the evidence of the Illinois Commerce Commission's *letter* and *investigative report* and *recommendations* regarding the Harmony Road crossing were

inadmissible because the Harmony Road crossing was a "railway-highway crossing" within the provisions of § 409. *Harrison* at 159, 160. (Emphasis added). The court stated that we are not at liberty to ignore the congressional mandate of § 409. *Id.*

At issue in *Harrison,* were the recommendations of the Illinois Commerce Commission that were made after an inspection of the crossing because of the plaintiffs' accident. *Harrison* at 157. The appellate court affirmed the lower court's finding that the letter and recommendations were inadmissible pursuant to 23 U.S.C. § 409 because they represented "data compiled for the purpose of identifying[,] evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings" if improvements may be implemented with the use of federal funds. *Harrison* at 159 (Emphasis added).

The court in *Harrison,* in citing *Robertson,* acknowledged that § 409's purpose was to "facilitate candor in administrative evaluations of highway safety hazards" or "to keep the record-keeping required by Federal funding provisions from providing an additional, virtually no-work tool for direct use in private litigation." *Harrison* at 156, footnote 3 (citations omitted).

In *Robertson v. Union Pacific Railroad Co.,* 954 F.2d 1433 (8th Cir. 1992), the United States Court of Appeal affirmed the district court's ruling that excluded from evidence, under 23 U.S.C. § 409, a newspaper article which identified the crossing at issue as the most hazardous railroad crossing in the state, the formula used by the Arkansas Highway Department for evaluating the hazardousness of crossing, and the Arkansas Highway Department's automobile count at the crossing. *Robertson*

at 1435. The court also affirmed the district court's ruling instructing appellants' expert witness not to consider any of the data compiled by the AHD for federally funded projects in formulating his opinion. *Robertson* at 1435. The court reasoned, "Both the formula and automobile count were compiled and utilized by the AHD pursuant to 23 U.S.C. § 130(d) for purposes of monitoring and improving highway railroad crossing safety." *Robertson* at 1435. The court also rejected appellants' argument that the formula and automobile count were admissible and held,

> "Although such information was available for other uses and purposes, the statute's mandatory language requires exclusion of such evidence at trial. 23 U.S.C. § 409." *Robertson* at 1435.

Lastly, the court in *Robertson, supra,* found that appellants were not entitled to introduce evidence of otherwise inadmissible data simply because it is reported by an indirect, secondary source. *Id.*

In *Lusby v. Union Pacific Railroad Company,* 4 F.3d 639 (8th Cir. 1993), the United States Court of Appeal interpreted 23 U.S.C. § 409, as originally enacted in 1987, and held,

> "the statute precludes an expert from rendering an opinion in court based on materials state authorities compiled for the purposes of complying with the federal program of enhancing safety at crossings under § 130(d)." *Lusby* at 641.

The court in *Lusby, supra,* reversed the district court and held that state materials do not fall outside the scope of § 409 merely because they are not compiled solely for federal reporting purposes and are available for other uses. *Lusby* at 641.

B. The decision of the Louisiana Second Circuit Court of Appeal interpreting 23 U.S.C. § 409 is directly contrary to decisions of the United States District Courts.

In a case on point, the United States District Court in the *Rodenbeck v. Norfolk & Western Railway Co.*, 982 F.Supp. 620 (N.D.Ind. 1997), held that correspondence between the railroad and the highway department requesting signing was inadmissible. The facts of *Rodenbeck* are remarkably similar to the present case. A third party produced to plaintiff correspondence between the Railroad Vice-President and the Allen County Highway Department that relayed a request by the Railroad for an agreement for additional signing with the County. The plaintiff in *Rodenbeck, supra,* as in the present suit, tried to argue that the request by the Railroad to the County was independent of any federal program.

The court held that the correspondence was protected pursuant to 23 U.S.C. § 409 because the documents and anticipated testimony fell within the intent of § 409 – to facilitate candor in administrative evaluations of highway safety standards. *Rodenbeck* at 624. The court also rejected plaintiff's argument that 23 U.S.C. § 409 only applied when federal funds were expended. The court held that 23 U.S.C. § 409 applies regardless of the actual expenditure of federal funds. *Id.*

In *Shots v. CSX Transportation, Inc.*, 887 F.Supp. 204 (S.D. Ind. 1995), the court granted defendant's motion for a protective order protecting documents relating to a federally funded project from discovery. *The protected materials included a letter from the Indiana Department of Highways to the railroad relaying requests from the city for the installation of signals at a crossing and provided that the*

project would be financed with the aid of federal funds. Shots at 205, 206. (Emphasis added). Other protected items included correspondence, proposed plans, drawings, photographs and invoices relating to the project.

Lastly, the court in *Taylor v. St. Louis Southwestern Ry. Co.*, 746 F.Supp. 50 (D.Kan. 1990), held that given the clear mandate of 23 U.S.C. § 409, any reports, surveys, schedules, lists or data pertaining to the evaluation of crossings, including the crossing at issue, undertaken pursuant to the safety enhancement-related purposes discussed in the statute, whether obtained from Kansas Department of Transportation, the Kansas Corporation Commission, Jefferson County, or Union Pacific, were inadmissible. The court in *Taylor* broke down the statute into the following categories:

1. Reports, surveys, schedules, lists or data;
2. Data compiled for the purposes of identifying, evaluating, or planning the safety enhancement of potential accident sites or railway highway crossings;
3. Pursuant to 23 U.S.C. § 130 providing, among other things, for state surveys of railway highway crossings and federal funding for protective devices; or,
4. Things for the purpose of developing any highway safety construction improvement project which may be implemented using federal aid highway funds. *Taylor* at 54.

The court reasoned that any information or documents which fell within the categories were inadmissible and that the overwhelming consideration in the development of this law was to facilitate candor and administrative evaluations of highway safety hazards by preventing a court from receiving records of such evaluations into evidence. *Id.*

Under the above stated criteria, the court in *Taylor* found that 23 U.S.C. § 409 precluded the admission of any testimony, evidence, or any document from the "KDOT", "KCC", Jefferson County or files and records from Union Pacific pertaining to the evaluation of crossings undertaken as a part of an analysis to determine the necessity for, and priority of, any changes, modifications or upgrading of the approach to and signalization of, crossings. *Id.*

C. The Louisiana Second Circuit Court of Appeal's decision in *Long* is also directly contrary to the decisions of other states' courts of last resort.

In *Claspill v. Missouri Pacific Railroad Company*, 793 S.W. 2d 139 (Mo. 1990), *cert. denied*, 498 U.S. 984, 111 S. Ct. 517, 112 L. Ed. 2d 529 (1990), the court found that a list of the most dangerous railroad crossings in Missouri, a Field Inspection Form proposing the addition of flashing signal lights at the Adrian crossing, compiled by the Public Service Commission and the Highway and Transportation Department, and related testimony of Mr. Meisel were inadmissible pursuant to 23 U.S.C. § 409. *Claspill* at 140. The court held,

> "The plain language of section 409 provides that certain information shall not be admitted into evidence if it was compiled for the purpose of developing any highway safety construction improvements project which may be implemented utilizing federal-aid highway funds." *Claspill* at 140.

The Court in *Claspill* did not require that 23 U.S.C. § 409 must be construed restrictively to prohibit only what is expressly proscribed by the statute. The Court in *Claspill*, found as the Louisiana Second Circuit Court of

Appeal in the present suit should have found that the recommendation for the signalization of the railroad grade crossing does fall within the protections afforded by 23 U.S.C. § 409.

The Mississippi Supreme Court in *Sawyer v. Illinois Central Gulf Railroad Company,* 606 So.2d 1069 (Ms. 1992), *rehearing denied* (Ms. 1992), affirmed the circuit court's ruling excluding from evidence a letter written two years before the appellant's accident from the Mississippi State Highway Department recommending that flashing lights be installed at the crossing, the hazard rank inventory, the testimony of the Highway Department State Aid Supervisor, E.A. Livingston, and testimony concerning the crossing's hazardous nature. *Sawyer* at 1073, 1074.

The court in *Sawyer* cited the Louisiana First Circuit Court of Appeal's decision in *Martinolich v. Southern Pacific Transportation Co.,* 532 So.2d 435 (La.App. 1 Cir. 1988) in support of its ruling to determine the material and evidence proscribed by Section 409.

In *Martinolich v. Southern Pacific Transportation Co.,* the court found priority lists were inadmissible. The court in *Martinolich, supra,* stated:

> "The documents made inadmissible by 23 U.S.C. § 409 are not 'all information gathered . . . ' as the trial court held, but rather 'reports, surveys, schedules, lists or data compiled. . . . ' This enumeration suggests something more than simple factual information that DOTD has gathered. ***These documents may reflect mental impressions, conclusions, and opinions of DOTD representatives*** regarding a survey of railroad grade crossings in need of 'separation, relocation, or protective devices . . . ,' if compiled in compliance with 23 U.S.C. § 130; ***or mental impressions, conclusions, and opinions of***

> ***DOTD representatives*** regarding 'hazardous locations, sections, and elements . . . [to be assigned] priorities for the correction of such . . . and [for the implementation of] a schedule of projects for their 'improvement,' if compiled in compliance with 23 U.S.C. § 152." (emphasis supplied) *Martinolich* at 438, 439.

The court in *Martinolich* also interpreted "considered for other purposes . . . ,"

> "to include any other trial use of the enumerated documents; *that is to say that for purposes of the finder of fact, the documents prohibited by 23 U.S.C. § 409 do not exist. They may not be referred to by counsel, and may not be used for impeachment purposes." Martinolich* at 439.

Subsequent to the decision in *Martinolich,* the Louisiana First Circuit Court of Appeal in *Hardenstein v. Cook Const., Inc.,* 96-0829 (La.App. 1 Cir. 2/14/97), 691 So.2d 177, 182, *writ denied,* 97-0686 (La. 4/25/97), 692 So.2d 1093, held that recommendations made by officials pursuant to inspections were protected by 23 U.S.C. § 409.

Hardenstein, in the First Circuit noted:

> "Applying these standards to the inspection report prepared by an engineer employed by the Federal Highway Administration, we find no error in the trial court's exclusion of that document. The report was an evaluation of an ongoing highway safety construction improvement project which used federal highway funding. ***It was more than 'raw data,' because it also contained the opinions and recommendations of the inspector***. Accordingly, the trial court was correct in concluding it could not be admitted." *Hardenstein* at 182. (emphasis added).

In the present suit, the Louisiana Second Circuit Court of Appeal's decision that the correspondence

between the Louisiana Department of Transportation and Development and the Village of Bonita concerning the recommendation to upgrade and signalization of the Harp Street crossing pursuant to the Federal-Aid Highway Program, 23 U.S.C. § 130 is admissible is directly contradictory to the United States Courts of Appeals' decisions in *Harrison*, *Robertson*, and *Lusby*, the United States District Courts' decisions in *Rodenbeck*, *Shots*, and *Taylor*, and the decisions in *Claspill* and *Sawyer*.

The Louisiana Second Circuit Court of Appeal's ruling that the correspondence is admissible cannot further the underlying intent of 23 U.S.C. § 409 which is to facilitate candor in administrative evaluations of highway safety hazards and to prohibit federally required record keeping from being used as a tool in private litigation. *Roberston* at 1435.

The letter from DOTD to the Mayor of the Village of Bonita, dated September 6, 1995, clearly states on its face, "[t]he Department plans to signalize the railroad crossing from funds available through a Federal Safety Program." *Long* at 745, p. App. 3, 4. The letter also states that the Federal Highway Administration requires that, "[t]he local governing body must agree by letter or resolution to maintain both pavement striping and signs." *Id.* The letter also sets forth the signs and pavement markings to be maintained and referenced a sheet copied from the Manual of Uniform Traffic Control Devices. *Id.* Finally, the letter states that the Department will proceed with the necessary steps to obtain approval from FHWA to complete the project subject to the Mayor's concurrence with the requirements. *Id.* On September 13, 1995, the Village of Bonita agreed and accepted by letter. Lastly, the affidavit of William C. Shrewsberry, Jr. stated that the only

reason why DOTD would compile or collect information on the Harp Street railroad crossing is because of the State's participation in the Federal Railway Upgrade Safety Program as set forth under 23 U.S.C. § 130. He further stated that outside of the Federal Railroad Safety Program, DOTD would not and does not perform any maintenance, or compile or collect any information on the Harp Street crossing.

The September 6, 1995 letter, the September 13, 1995 letter, and the affidavit of William C. Shrewsberry, Jr. state the necessary elements to invoke the protections afforded under 23 U.S.C. § 409. The September 6, 1995 and September 13, 1995 letters contain both conclusions concerning the upgrade of the Harp Street crossing and factual information concerning the signs and pavement markings to be placed and maintained at the crossing. The letters at issue are clearly " . . . information compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings pursuant to Sections 130, 144 and 152 of this title," and are part of "records amassed pursuant to the federal safety evaluation programs" as required by 23 U.S.C. § 409.

II. Petitioner's writ of certiorari should be granted because the decision of the Louisiana Second Circuit Court of Appeal in *Long* represents a continued pattern of erroneous interpretations of 23 U.S.C. § 130 and 23 U.S.C. § 409 by the Louisiana Courts that can only be corrected by this Honorable Court.

In *Arnold v. Illinois Central Gulf Railroad*, 501 So.2d 778 (La. App. 1 Cir. 1987), a suit arising prior to the original enactment of 23 U.S.C. § 409, the Louisiana First Circuit

Court of Appeal reversed the findings of the trial court and held DOTD fifty percent at fault for a railroad grade crossing accident that occurred on a roadway that was under the jurisdiction of the City of Hammond and not part of the state highway system as described in La. R.S. 48:191. *Arnold* at 779.

The court held that the basis of DOTD's duty and liability stemmed from its receipt of $3,500,000 in annual federal funding based on the State's participation in the Federal-aid highway program, 23 U.S.C. § 130. *Id.* The court held, "In fact the basis for the federal funding is 23 U.S.C. § 130, which imposes a duty on each state to provide protective devices at such crossings." *Id.*

On April 2, 1987, Congress amended Title 23 to enact 23 U.S.C. § 409 in Act of April 2, 1987, Pub.L. 100-17, Title I, § 132(a), 101 Stat. 170. The first interpretation of the original enactment of 23 U.S.C. § 409 by a Louisiana court was in *Martinolich v. Southern Pacific Transportation Company*, 532 So.2d 435 (La. App. 1 Cir. 1988), *writ denied*, 535 So.2d 745 (La. 1989), *cert. denied*, 490 U.S. 1109, 109 S. Ct. 3164, 104 L. Ed. 2d 1027 (1989).

The court in *Martinolich* reversed the trial court's finding that, "23 U.S.C. Section 409 creates a privilege as to all information collected pursuant to the federal programs covered by the statute." *Martinolich* at 437. The court of appeal reasoned that priority lists developed pursuant to 23 U.S.C. § 130 were discoverable, "Because preemption is not presumed, we construe 23 U.S.C. § 409 restrictively, to intrude only so much as Congress has expressly prescribed." *Martinolich* at 438. The court of appeal examined the language of 23 U.S.C. § 409, "or considered for other purposes . . . " and found that the statute did not include discovery of the same documents

that were inadmissible under 23 U.S.C. § 409 because of the objectives of Louisiana's liberal discovery process set forth by Louisiana Code of Civil Procedure articles 1421 through 1474. Writs were denied by the Louisiana Supreme Court on January 6, 1989 and certiorari was denied by the United States Supreme Court in 490 U.S. 1109, 109 S. Ct. 3164, 104 L. Ed. 2d 1027 (1989).

23 U.S.C. § 409 was amended by the Act of December 18, 1991, Pub.L. 102-240, Title I, § 1035(a), 105 Stat. 1978. The 1991 amendment to § 409 substituted "Discovery and admission" for "Admission" in the heading of the statute and substituted in the text "subject to discovery or admitted into evidence in a Federal or State court proceeding" for "admitted into evidence in a Federal or State court." The House of Representatives included in H.R. Conf. Rep. No. 102-171(I), 102nd Cong., 1st Sess. 1991, 1991 U.S.C.C.A.N. 1526, Sec. 136, the purpose of the amendment. The House Conference report stated,

> "This section clarifies that no report, survey, schedule list, or data compiled for the purpose of complying with section 130 and 144 of title 23, United States Code, or for developing any highway safety construction project which may be implemented with Federal-aid highway fund shall be subject to discovery or admitted into evidence in a Federal or state court proceeding."

On November 29, 1993, the Louisiana Supreme Court in *Wiedeman v. Dixie Electric Membership*, 627 So.2d 170 (La. 1993), *rehearing denied* (La. 1/6/94), *cert. denied*, 511 U.S. 1127, 114 S. Ct. 2134, 128 L. Ed. 2d 864 (1994), interpreted 23 U.S.C. § 409 as amended in 1991 and determined that DOTD traffic flow studies, traffic counts,

accident reports, raw data, and other reports and evaluations concerning the accident site were discoverable and admissible. *Wiedeman* at 173. The court in *Wiedeman* found, "Section 409 creates a privilege for compilations enumerated in the statute, but the privilege does not extend to reports and data gathered for or incorporated into such compilations." *Id.*

To reach this restrictive interpretation, the Louisiana Supreme Court relied on *Webster's New Collegiate Dictionary*, p. 230, 1977, for the definition of the word "compiled". The court incorrectly reasoned that "compiled" suggested an end product, something more than unedited factual material. *Id.*

Rehearing was denied by the Louisiana Supreme Court on January 6, 1994, and certiorari was denied by the United States Supreme Court in *Louisiana Department of Transportation and Development v. Wiedeman*, 511 U.S. 1127, 114 S. Ct. 2134, 128 L. Ed. 2d 864 (1994).

The Louisiana Supreme Court in *Rick v. State of Louisiana Department of Transportation and Development*, 93-1776 (La. 1/14/94), 630 So.2d 1271, *rehearing denied* (Feb. 10, 1994), found DOTD fifty percent at fault in causing an automobile/train accident that occurred at a railroad grade crossing that was not part of the state highway system for its failure to upgrade the railroad crossing once it had selected it for improvements pursuant to 23 U.S.C. § 130. The court held, "The Highway Safety Act of 1973, the federal law making railroad crossing funds available to the states, imposes an affirmative duty to survey those crossings. 23 U.S.C. § 130(d)." *Rick* at 1273, 1274.

The court also found that DOTD assumed a duty to upgrade the crossing by selecting it for improvement

based on its review of the crossing under 23 U.S.C. § 130(d). *Rick* at 1275. The court in *Rick*, as in the present suit, allowed into evidence the letter from the Mayor to DOTD requesting active warning devices and allowed into evidence accident reports, traffic counts, and other raw data collected by DOTD pursuant to the court's ruling in *Wiedeman*. *Rick* at 1276, 1277.

23 U.S.C. § 409 was again amended to insert the words "or collected" after "compiled" by Act of November 28, 1995, Pub.L. 104-59, Title III § 323, 109 Stat. 591. The accompanying legislative language contained in H.R. No. 104-246, 104th Cong., 1st Sess. 1995, 1996 U.S.C.C.A.N. 522, Sec. 328, states:

> "This section amends section 409 of title 23 to clarify that data 'collected' for safety reports or surveys shall not be subject to discovery or admitted into evidence in Federal or State court proceedings.
>
> This clarification is included in response to recent State court interpretations of the term 'data compiled' in the current section 409 of title 23. It is intended that raw data collected prior to being made part of any formal or bound report shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding arising from any occurrence at a location mention (sic) or addressed in such data."

The Louisiana Supreme Court in *Reichert v. State of Louisiana, Department of Transportation and Development*, 96-1419 (La. 5/20/97), 694 So.2d 193, held that the 1995 amendment to 23 U.S.C. § 409 was added in response to its decision in *Wiedeman* which found that "raw data" was discoverable and admissible. *Reichert* at 198. The court further held, "The statute itself was enacted to insulate

DOTD from liability when upholding its public trust of continually examining the safety of public highways." *Id.*

"The purpose of section 409 is to '[f]oster the free flow of safety-related information by precluding the possibility that such information later would be admissible in civil suits. The interest to be served by such legislation is to obtain information with regard to the safety of roadways free from the fear of future tort actions'." *Reichert* at 197.

On July 2, 1999, the Louisiana Supreme Court in *Palacios v. Louisiana and Delta Railroad, Inc.*, 98-2932 (La. 7/2/99), 740 So.2d 95, addressed the burden of proof DOTD must carry to invoke the protections afforded by 23 U.S.C. § 409 based on the State's inspection and survey of a non-state highway railroad grade crossing pursuant to 23 U.S.C. § 130. The court in *Palacios* did not address whether DOTD had assumed an affirmative duty to upgrade the off-system railroad crossing based on its knowledge and information gained of the crossing pursuant to 23 U.S.C. § 130.

The court in *Long* acknowledged that DOTD's duty to the Harp Street crossing was grounded in the federal highway-aid program. *Long* at 748. App. A, p. App. 11, 12. This determination was based on the court of appeal's review of the correspondence between DOTD and the Mayor of the Village of Bonita, and the affidavit of William C. Shrewsberry, Jr., the DOTD administrator of the Federal Railroad Safety Program.

As noted previously, the letter from the DOTD to the Mayor refers to "plans to signalize the railroad crossing from funds available through a federal safety program." On its face, the letter reflects that a decision has been

made pursuant to a federal safety program, that signalization had been recommended, and that the letters are part of the approval process for obtaining federal funding.

The Second Circuit's ruling in *Long, supra,* that the correspondence is admissible is in direct conflict with rulings in *Harrison, supra, Shots, supra,* and *Rodenbeck, supra,* concerning the burden of proof necessary to invoke the protections afforded under 23 U.S.C. § 409 and the extent of the information that falls under its protection. As such, the holding by the Louisiana Second Circuit Court of Appeal that the conclusions, factual information about the items to be placed at the Harp Street crossing, and agreement communicated by correspondence for the improvement of the Harp Street crossing was not proper material for protection is contrary to the plain meaning and purpose of 23 U.S.C.A § 409 and the Federal courts' decisions interpreting the statute.

Allowing the discovery and admission into evidence correspondence developed solely pursuant to DOTD's participation in the Federal-aid highway program cannot serve to "[f]oster the free flow of safety-related information by precluding the possibility that such information later would be admissible in civil suits. The interest to be served by such legislation is to obtain information with regard to the safety of roadways free from the fear of future tort actions" as stated by the Louisiana Supreme Court in *Reichert.* The court of appeal's ruling also cannot serve to "facilitate candor in administrative evaluations of highway safety hazards" as held in the United States Court of Appeals' decisions in *Robertson* and *Harrison.*

DOTD would not know about or maintain any information concerning the Harp Street crossing in the Village

of Bonita but for its participation in the Federal-aid highway program. The decision in *Long* clearly illustrates how DOTD's surveys of non-state highway railroad grade crossings pursuant to 23 U.S.C. § 130 are being utilized to establish a private cause of action and a duty on behalf of DOTD where none exists under Federal or State law. The court of appeal's decision in *Long* can only serve to expose DOTD to liability while continually examining the safety of public highways.

The court in *Long* has interpreted 23 U.S.C. § 409 in a manner that assures that the conclusions and recommendations reached by DOTD are discoverable and admissible because the correspondence makes no reference to "reports, surveys, schedules, lists, or data," – the only items expressly proscribed from admission or discovery." *Long* at 748, 749. The court in *Long* has come full circle from the decision reached in *Wiedeman* by finding that compilations are discoverable and admissible if there is no raw data contained in the document. *Long* at 748.

Based on the court's ruling in *Long*, all documents or letters relaying requests and recommendations for signalization of crossings will be discoverable and admissible under 23 U.S.C. § 409. With this interpretation DOTD, railroads, and local governing authorities would never be able to plan and complete the safety enhancement of railway-highway grade crossings pursuant to 23 U.S.C. § 130 without fear of future tort action.

The Court's reversal of the trial court's order striking the correspondence from the record *cannot* serve to "[f]oster the free flow of safety related information . . . ," when it does not allow DOTD and the Village of Bonita to reach agreements in order to fulfill FHWA requirements "free from the fear of future tort actions."

It is illogical and inconsistent with the intent of 23 U.S.C. § 130 and 23 U.S.C. § 409 to not allow DOTD to enter agreements with the local governing authorities without fear that those agreements will later be used as a basis of future tort litigation.

III. Petitioner's writ of certiorari should be granted because the decision of the Louisiana Second Circuit Court of Appeal in *Long* erroneously utilizes 23 U.S.C. § 130 as a basis to establish liability and a private cause of action against DOTD where none exists under Louisiana law, La. R.S. 48:757 or Federal law.

Louisiana Revised Statute 48:757 specifically prohibits the State from performing work on parish road systems or on any other roads or streets that do not form part of the state highway system. p. App. 27. The courts in Louisiana have consistently held that the duty to maintain a roadway in reasonably safe condition falls on the governing authority with jurisdiction over it. *Wall v. American Employers Insurance Company*, 215 So.2d 913 (La. App. 1 Cir. 1968), *writ denied*, 217 So.2d 415 (La. 1969).

However, DOTD has consistently been found to owe a duty and to be liable based on its survey and inspection of the non-state highway railroad grade crossing pursuant to the Federal-aid highway program, 23 U.S.C. § 130 as held in *Arnold v. Illinois Central Gulf Railroad, supra*, and *Rick v. State of Louisiana, Department of Transportation and Development, supra*.

These findings are directly contrary to the plain language of 23 U.S.C. § 130 and the United States Court of Appeal's decision in *Daye v. Commonwealth of Pennsylvania*, 483 F.2d 294 (3rd Cir. 1973), affirming the district court decision, 344 F. Supp. 1337 (E.D. Penn. 1972). At

issue in the district court and on appeal was whether a state's participation in Federal-aid highway programs under 23 U.S.C. §§ 101 *et seq.* and the Highway Safety Act 23 U.S.C. §§ 401 *et seq.* created a duty on behalf of the states running toward plaintiffs and whether it created a private action for breach thereof. The court of appeal affirmed the district court in *Daye* and concluded that no such duty or private cause of action existed under the federal highway programs. *Daye*, 483 F.2d 294, 299. The court of appeal determined that the only sanctions expressly authorized by statute under the acts were those whereby federal funding could be withdrawn for non-compliance.

The United States Supreme Court denied certiorari. 416 U.S. 946, 94 S. Ct. 1956, 40 L. Ed. 2d 298 (1974).

In the present suit as in *Daye*, DOTD's participation in the Federal-aid highway program, 23 U.S.C. § 130 does not imply or expressly create a cause of action to recover damages for personal injuries. The only express sanction provided for by the Federal-aid highway program, 23 U.S.C. § 130 is the disqualification of the state for federal funds. 23 U.S.C. § 109(e).

CONCLUSION

This Court should grant a writ of certiorari and decide whether correspondence between the State of Louisiana, through the Department of Transportation and Development and the Village of Bonita concerning the signalization of a non-state highway falls within the protections of 23 U.S.C. § 409 and whether the State's participation in the Federal-aid highway program, 23 U.S.C. § 130 creates a cause of action that exposes the State to

liability when no such cause of action or liability exists under Louisiana or Federal law.

Respectfully submitted,

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APPENDIX A

Judgment rendered August 18, 1999. Application for rehearing may be filed within the delay allowed by art. 2166, La. C.C.P.

No. 32,124-CA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

JAMES W. LONG, INDIVIDUALLY AND ON BEHALF OF HIS MINOR SON, CHRISTOPHER W. LONG, and JAMIE LONG COLEY — Plaintiffs-Appellants

versus

STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATAION AND DEVELOPMENT — Defendant-Appellee

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Appealed from the Fourth Judicial District Court for the Parish of Ouachita, Louisiana Trial Court No. 97-805

Honorable Alvin R. Sharp, Judge

RICHARD L. FEWELL, JR. — Counsel for Appellants

LOUISIANA DEPARTMENT OF JUSTICE
By: William E. Crawford, Jr.
Assistant Attorney General — Counsel for Appellee

Before STEWART, CARAWAY & PEATROSS, JJ.

PEATROSS, J.

The surviving spouse, James W. Long, individually and on behalf of his minor son, Christopher W. Long, and the surviving major child of Betty Long, Jamie Long Coley ("Plaintiffs"), appeal the judgment of the trial court striking certain allegations in their petition relating to particular correspondence, striking the correspondence from the record and the resulting grant of the Department of Transportation and Development's ("DOTD") motion for summary judgment dismissing Plaintiffs' case. For the following reasons, we reverse.

FACTS

On September 10, 1997, at a crossing on Harp Street in the village of Bonita, Louisiana, a Union Pacific train struck a car driven by Mrs. Betty Long. The crash killed Mrs. Long. Her husband, James Long, her adult daughter, Jamie Long Coley, and her minor son, Christopher Long, brought wrongful death and survival actions against the DOTD. Plaintiffs alleged that the DOTD was negligent in failing to erect adequate warning devices at the crossing and in failing to adequately mark the crossing.

Plaintiffs further alleged that the DOTD breached a duty it assumed two years earlier to signalize the crossing. In support of this allegation, Plaintiffs presented to the court correspondence between Mayor Michael J. Lytle of Bonita and the DOTD. The first letter, from the mayor to the DOTD, read as follows:

May 18, 1995

Mr. Bill (sic) Shwersberry
State of Louisiana
Department of Transportation and Development
P.O. Box 94245
Baton Rouge, LA 70804-9245

Dear Mr. (sic) Shwersberry:

On May 12, 1995, there was (sic) an fatal accident at (sic) an railroad grade crossing in Bonita. The grade crossing is unmarked except for wooden crossbucks. Mr. David Peterson of the Union Pacific RR informs me that your office is in charge of determining whether warning lights or gates are needed at grade crossings.

There have been two previous accidents at this crossing, one with a fatality in the last eight years. I believe that some additional warning is needed at this crossing and am requesting an on-site review of the situation by your office.

Sincerely,
/s/
Michael J. Lytle, Mayor
Village of Bonita

The DOTD responded to the mayor's letter as follows:

September 6, 1995

STATE PROJECT NO. 714-34-0101
FAP NO. PENDING
UP (BONITA)
DOT NO. 438-805J
HARP STREET
MOREHOUSE PARISH

The Honorable Michael J. Lytle
Mayor – City of Bonita
Post Office Box 228
Bonita, Louisiana 71223

Dear Mr. Lytle:

Under the above referenced project, the Department plans to signalize the railroad crossing from funds available through a federal safety program. In order to comply with Federal Highway Administration requirements, the local governing body must agree by letter or resolution to maintain both pavement striping and signs.

Please see attached sheet copied from Manual of Uniform Traffic Control Devices. There will normally be two signs and two sets of pavement markings to maintain.

Upon receipt of your concurrence, the Department will proceed with the necessary steps to obtain approval from FHWA to complete the project.

Very truly yours,
/s/
Merlin A. Pistorius
Chief, Maintenance Division

Mayor Lytle responded with this letter:

September 13, 1995

Mr. Merlin A. Pistorius
State of Louisiana
Department of Transportation and Development
P O Box 94245
Baton Rouge, LA 70804-9245

RE: STATE PROJECT NO. 714-34-0101
FAP NO. PENDING
UP (BONITA)
DOT NO. 438-805J
HARP STREET
MOREHOUSE PARISH

Dear Mr. Pistorius:

We were happy to receive your letter of September 6, 1995, stating your intention to signalize the above referenced railroad crossing. We understand our obligation to maintain the pavement striping and signs.

By this letter we agree to maintain the pavement striping and signs.

Sincerely,
/s/
Michael J. Lytle, Mayor
Village of Bonita

In response to Plaintiffs' petition, the DOTD filed a motion to strike the correspondence from the pleadings and record and a motion for summary judgment. The motion for summary judgment asserted that the Harp Street crossing was not part of the state highway system and that the DOTD is forbidden to perform maintenance on such "off-system" crossings. Both motions asserted that the DOTD's correspondence with Mayor Lytle was information compiled or collected solely due to the DOTD's participation in the Federal Railway Upgrade Safety Program, 23 U.S.C. § 130, and was protected from discovery or admission into evidence pursuant to 23 U.S.C. § 409, which reads as follows:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists or data

> compiled, or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossing, pursuant to sections 130, 144 and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

In support of its motion for summary judgment, the DOTD attached affidavits from Steven Cumbaa, the DOTD's construction services engineer, and from William C. Shwersberry [sic], Jr., the DOTD's administrator of the Federal Railroad Safety Program ("FRSP"). Mr. Cumbaa stated that the crossing was not a part of the state highway system; and Mr. Shwersberry [sic] indicated, *inter alia*, that the only reason the DOTD would collect or compile information about, or maintain, the crossing was because of the FRSP.

DISCUSSION

On appeal, Plaintiffs have not challenged the implicit finding of the trial court that the Harp Street crossing was not a part of the state highway system (La. R.S. 48:191) and, thus, not within the DOTD's statutory responsibility. La. R.S. 48:757. Rather, Plaintiffs assert that the correspondence between Bonita's mayor and the DOTD was

admissible and created a duty for the DOTD to signalize the crossing.

Plaintiffs rely heavily on *Rick v. State*, Department of Transportation and Development, 93-1776 (La.1/14/94), 630 So.2d 1271, which was rendered before 23 U.S.C.A. § 409 was amended to exclude certain evidence from trial. In *Rick*, the plaintiffs were the survivors of a motorist killed on July 20, 1988, in a train-car crash at an off-system crossing in Hammond, Louisiana. The plaintiffs sued the DOTD, urging that it was liable for failing to signalize the crossing. The supreme court explained the federal scheme of crossing improvement:

> State highway railroad crossings are regarded as on system, and other railroad crossings are off system. The Highway Safety Act of 1973, the federal law making railroad crossing funds available to the states, imposed an affirmative duty to survey those crossings. 23 U.S.C. § 130(d). *See CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, ___, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993).
>
> In 1976, the United States Congress began funding off system crossings, paying ninety percent of the costs. In 1983, after enactment of the Federal Surface Transportation Assistance Act of 1982, the Louisiana DOTD started upgrading off system crossings. Initially, the DOTD's program was limited to urban off system crossings. By 1984, the DOTD was also improving rural off system crossings.

In *Rick*, the DOTD responded to the plaintiffs' action by asserting that this scheme did not impose a duty upon the agency to signalize the off-system crossing. The plaintiffs,

however, obtained and introduced into evidence a letter written in August 1983 by Hammond Mayor Debbie Saik Polk, to the DOTD, requesting active warning devices for three dangerous crossings, including the crossing where the fatal accident later occurred. On September 10, 1986, the DOTD selected the crossing for upgrade with "active warning devices, automatic signal lights and automatic gates, plus rubber mats to smooth the rough surface." The case does not specify how the plaintiffs learned that the DOTD had selected the crossing for upgrade. The DOTD and the railroad inspected the crossing on April 7, 1987, but the railroad did not approve the upgrade until after the fatal accident.

The supreme court rejected the DOTD's argument that it had no duty to upgrade the crossing. The court stated:

> Here, it is unnecessary to decide whether the DOTD had an affirmative duty because the DOTD assumed a duty to upgrade this crossing by selecting it for improvement on September 10, 1986. Once a duty is assumed, negligent breach of that duty may create liability. *Harris v. Pizza Hut of Louisiana, Inc.*, 455 So.2d 1364 (La. 1984).

Other cases where the DOTD was found to have assumed a duty to improve a crossing include *Archon v. Union Pacific Railroad*, 94-2728 (La.6/30/95), 657 So.2d 987, *rehearing granted*, 94-2728 (La. 4/2/96), 675 So.2d 1055; and *Cambre v. National Railroad Passenger Commission, et al.*, 97-473 (La. App. 5th Cir. 12/10/97), 705 So.2d 237.

Under Louisiana's law of discovery, parties may obtain discovery regarding any matter not privileged

which is relevant to the subject matter of the action. La. C.C.P. art. 1422. Further, evidence which is relevant is generally admissible into evidence. La. C.E. art. 402. With regard to certain highway safety information, however, Louisiana's law is preempted by federal law. In *Archon, supra,* the plaintiffs learned that the DOTD had assumed responsibility for improving the crossing through evidence that was not restricted by 23 U.S.C. § 409; and in *Cambre, supra,* the issue was not before the court of appeal.

In *Wiedeman v. Dixie Electric Membership Corp.*, 627 So.2d 170, 172 (La.1993), the supreme court stated:

> Despite the State's substantial interest, Sec. 409's explicit preemptive language overrides conflicting state law by virtue of the Supremacy Clause. U.S. Const. art. VI, cl. 2; *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604, 613 (1977). Section 409 controls. *Beecher v. Keel*, 607 So.2d 549 (La. 1992). . . .
>
> Since preemption is never presumed, Sec. 409 must be construed restrictively to prohibit only what is expressly proscribed. *Rath Packing Co.*, 430 U.S. at 525, 97 S.Ct. at 1309.

The *Rick* and *Wiedeman* cases were decided under a previous version of the statute which did not restrict access to raw data; that restriction was added in 1995.

In *Reichert v. State, Department of Transportation and Development, et al.*, 96-1419 (La.5/20/97), 694 So.2d 193, 197, the supreme court interpreted the change in § 409, stating:

> We hold section 409 bars discovery and introduction into evidence of all highway safety

> information collected or compiled by the State for the purpose of obtaining federal funds to enforce safety.

In *Reichert*, the court addressed the admissibility of four exhibits. Each of these exhibits contained or made reference to a report or study produced pursuant to the State's effort to obtain federal funds for safety improvements. The court concluded that the exhibits "reflect[ed] information collected and compiled by the DOTD in furtherance of potential highway safety projects that may have been supported by federal funds" and were, thus, inadmissible. This conclusion was reached despite the fact that the studies were not conducted to further a potential federally funded highway safety program, but "pursuant to citizen's complaints." *Id.* at 200.

In the recent Louisiana Supreme Court decision of *Palacios v. Louisiana and Delta Railroad Inc.*, 98-2932 (La. 7/2/99), 740 So.2d 95, the court set out four criteria to test the applicability of § 409. The information in question must be:

> (1) reports, surveys schedules, lists or data;
>
> (2) compiled or collected;
>
> (3) for the purpose of identifying, evaluating or planning the safety enhancement of . . . railway-highway crossings;
>
> (4) pursuant to 23 U.S.C.A. § 130.

Coupling this criteria with the analysis set forth in *Reichert, supra*, and mindful that "all highway safety information collected or compiled by the State for the purpose of obtaining federal funds to enforce safety" must be excluded, we conclude that 23 U.S.C.A. § 409, in this case,

bars only a portion of the correspondence from discovery or admission into evidence. The letter from Bonita's mayor to the DOTD informing the DOTD that there had been a fatal accident at the crossing is protected by the statute. That letter, which provides information about several particular events, falls within the prohibition against the admission of (1) data . . . (2) collected (3) for the purpose of identifying . . . the safety enhancement of . . . railway-highway crossings. . . . (4) pursuant to 23 U.S.C.A. § 130.

We are convinced, however, that the letter from the DOTD to Mayor Lytle and the responsive letter from Mayor Lytle to the DOTD contain no information restricted by the statute. Although the letter from the DOTD specifies that the federal government is the expected source of funds for the planned improvement, it makes no reference whatsoever to any "reports, surveys, schedules, lists, or data," the only items "expressly proscribed" from admission or discovery. *Palacios, supra; Wiedeman, supra.* These letters are unlike the exhibits in *Reichert* which contained reports or data along with information about the DOTD's plans. Further, the letters contain no suggestion that the planned improvement was based on any of the restricted information. We, therefore, distinguish these letters from the contract involved in *Stephens v. Town of Jonesboro,* 25,715 (La. App. 2d Cir. 8/19/94), 642 So.2d 274, which contained "information relating to a highway safety construction improvement."

We do not believe that the mere reference to the project's funding through the federal program constitutes "reports, surveys, schedules, lists, or data" for the purpose of the statute. Unlike *Archon, supra,* the DOTD's

duty here was grounded in the federal highway-aid program, but this alone does not require the exclusion of the letters which do not contain or refer to any of the prohibited material. 23 U.S.C.A. § 409 is specific about what information is protected. The purpose of § 409 is to "[f]oster the free flow of safety-related information by precluding the possibility that such information later would be admissible in civil suits. The interest to be served by such legislation is to obtain information with regard to the safety of roadways free from the fear of future tort actions." *Reichert, supra,* at 197, citing *Perkins v. Ohio Dept. Of Transp.*, 65 Ohio App.3d 487, 584 N.E.2d 794 (1989), *cause dismissed*, 57 Ohio St.3d 612, 566 N.E.2d 673, *reh'g denied*, 58 Ohio St.3d 711, 570 N.E.2d 281 (1991). The two letters in the case *sub judice* do not contain or refer to any such safety information. The statute should be strictly construed to protect only that information within its ambit. *Wiedeman, supra.* See also *Palacios, supra,* which stated, "[o]f course, this is not to say that all documents and information in the state's possession will always be privileged under § 409. . . . only . . . records amassed pursuant to the federal safety evaluation program . . . or for the purpose of developing other highway safety improvement projects which may be federally funded, are protected."[1]

---

[1] Since the letters were written to or by the DOTD and in the possession of Mayor Lytle, we also question whether or not these documents were "compiled or collected" as required by the statute. The principle behind § 409 is to prevent a party from using information which the state has expended time, effort and money to gather to determine the necessity of given improvements, to be used against it. These letters do not contain such information.

We find, therefore, that the trial court erred by striking these documents from the record. It thus follows that since Plaintiffs' theory of the case rests partly on the matter addressed in the letters and because the trial court erred in excluding these letters from the record, the trial court's ruling granting the DOTD's motion for summary judgment is also in error.

With the DOTD's September 6, 1995 letter, Plaintiffs have alleged that the DOTD assumed a duty which was breached during the two-year delay between the time of that letter and the accident. In view of *Rick, supra* and *Archon, supra,* material fact issues regarding the extent and breach of that assumed duty have not been overcome by DOTD's evidence in support of its motion for summary judgment, which merely shows that the Harp Street crossing was an "off-system" crossing. This conclusion further makes the trial court's granting of DOTD's motion improper.

DECREE

For the foregoing reasons, the judgment of the trial court striking the letter written to Mayor Lytle by Defendant, the State of Louisiana through the Department of Transportation and Development and Mayor Lytle's response is hereby reversed. Further, the judgment of the trial court granting summary judgment in favor of Defendant and dismissing the suit of Plaintiffs, James W. Long, individually and on behalf of his minor son, Christopher W. Long, and Jamie Long Coley, is hereby reversed. The

suit, therefore, is remanded for further proceedings in accordance with this judgment.

REVERSED AND REMANDED.

APPENDIX B

STATE OF LOUISIANA * PARISH OF MOREHOUSE * FOURTH JUDICIAL COURT

JAMES W. LONG, ET AL **FILED: _____**

VERSUS NO. 97-805

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT

_____

DEPUTY CLERK OF COURT

JUDGMENT

(Filed Sep. 15, 1998)

This cause having been set down for hearing and the Court considering the averments adduced at the hearing and considering the written post-trial briefs submitted by all counsel of record, and considering the law applicable thereto:

IT IS ORDERED, ADJUDGED AND DECREED that the Exception of No Right of Action filed herein on April 3, 1998, is hereby declared moot and abandoned.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant's Motion to Strike is hereby granted.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant's Motion for Summary Judgment is hereby granted.

JUDGMENT RENDERED the 11TH day of August 1998.

JUDGMENT SIGNED this 18th day of Sept. 1998 at Monroe Ouachita Parish, Louisiana.

/s/ Alvin Sharp
JUDGE ALVIN SHARP

APPROVED AS TO FORM:

/s/ Richard L. Fewell, Jr.
RICHARD L. FEWELL, JR.
Attorney for Plaintiffs

/s/ William E. Crawford, Jr.
WILLIAM E. CRAWFORD, JR.
Attorney for Defendant

APPENDIX C

STATE OF LOUISIANA
COURT OF APPEAL, SECOND CIRCUIT
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Baton Rouge LA 70804-4095

REHEARING ACTION: September 16, 1999

Docket Number: 32,124-CA

JAMES W. LONG, ET AL

VERSUS

STATE OF LOUISIANA DOTD

BEFORE JUDGES:

William M. Norris III
Felicia Toney Williams
James Edward Stewart
J. Jay Caraway
Charles B. Peatross

As counsel of record in the captioned case, you are hereby notified that the application for rehearing filed by State of Louisiana DOTD has this day been

DENIED.

FOR THE COURT

Diana Pratt-Wyatt
Clerk of Court

cc: John Claiborne Young, Counsel for Appellee
Richard L. Fewell Jr., Counsel for the Appellant

APPENDIX D

STATE OF LOUISIANA

PARISH OF MOREHOUSE

IN THE
FOURTH JUDICIAL DISTRICT COURT

JAMES LONG, et al.	**FILED: _____**
versus	**97-805**
STATE OF LOUISIANA, DOTD	**_____ DEPUTY CLERK OF COURT**

****

MINUTE ENTRY AND ORDER

(Filed Aug. 12, 1998)

****

Considering the above captioned cause and the averments adduced at the hearing on the merits previously heard by this Court, and considering the written post trial papers submitted by all counsel of record, and considering the law applicable thereto;

IT IS, HEREBY, ORDERED **that the Exception of No Right of Action previously filed be – and is hereby – declared to be Moot in that all counsel of record indicated such.**

IT IS ORDERED **that Defendant's Motion to Strike be – and is hereby – Granted.**

IT IS FURTHER ORDERED **that Defendant's Motion for Summary Judgment be – and is hereby – Granted in**

that the pervasiveness of the Federal regulatory scheme of the statute in question warrants same.

IT IS SO ORDERED.

THUS DONE AND SIGNED IN CHAMBERS ON THIS 11TH DAY OF AUGUST 1998.

/s/ Alvin R. Sharp
DISTRICT JUDGE
Division "I"

PLEASE SERVE ALL COUNSEL OF RECORD

APPENDIX E

The Supreme Court of the State of Louisiana

JAMES W. LONG, INDIVIDUALLY AND ON BEHALF OF HIS MINOR SON, CHRISTOPHER W. LONG, AND JAMIE LONG COLEY

VS. NO. 99-C-2956

STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT

IN RE: Louisiana, State of; – Defendant; Applying for Writ of Certiorari and/or Review, Parish of Ouachita, 4th Judicial District Court Div. G, Nos. 97-805; to the Court of Appeal, Second Circuit, No. 32,124-CA

December 17, 1999

Denied.

BJJ
PFC
WFM
CDK
CDT
JTK

LEMMON, J., not on panel.

Supreme Court of Louisiana
December 17, 1999

/s/ Rai T. Daigle
Clerk of Court
Deputy For the Court

APPENDIX F

23 U.S.C. § 130. Railway-highway crossings

(a) Subject to section 120 and subsection (b) of this section, the entire cost of construction of projects for the elimination of hazards of railway-highway crossings, including the separation or protection of grades at crossings, the reconstruction of existing railroad grade crossing structures, and the relocation of highways to eliminate grade crossings, may be paid from sums apportioned in accordance with section 104 of this title. In any case when the elimination of the hazards of a railway-highway crossing can be effected [sic] by the relocation of a portion of a railway at a cost estimated by the Secretary to be less than the cost of such elimination by one of the methods mentioned in the first sentence of this section, then the entire cost of such relocation project, subject to section 120 and subsection (b) of this section, may be paid from sums apportioned in accordance with section 104 of this title.

(b) The Secretary may classify the various types of projects involved in the elimination of hazards of railway-highway crossings, and may set for each such classification a percentage of the costs of construction which shall be deemed to represent the net benefit to the railroad or railroads for the purpose of determining the railroad's share of the cost of construction. The percentage so determined shall in no case exceed 10 per centum. The Secretary shall determine the appropriate classification of each project.

(c) Any railroad involved in a project for the elimination of hazards of railway-highway crossings paid for

in whole or in part from sums made available for expenditure under this title, or prior Acts, shall be liable to the United States for the net benefit to the railroad determined under the classification of such project made pursuant to subsection (b) of this section. Such liability to the United States may be discharged by direct payment to the State transportation department of the State in which the project is located, in which case such payment shall be credited to the cost of the project. Such payment may consist in whole or in part of materials and labor furnished by the railroad in connection with the construction of such project. If any such railroad fails to discharge such liability within a six-month period after completion of the project, it shall be liable to the United States for its share of the cost, and the Secretary shall request the Attorney General to institute proceedings against such railroad for the recovery of the amount for which it is liable under this subsection. The Attorney General is authorized to bring such proceedings on behalf of the United States, in the appropriate district court of the United States, and the United States shall be entitled in such proceedings to recover such sums as it is considered and adjudged by the court that such railroad is liable for in the premises. Any amounts recovered by the United States under this subsection shall be credited to miscellaneous receipts.

(d) Survey and schedule of projects. – Each State shall conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this

purpose. At a minimum, such a schedule shall provide signs for all railway-highway crossings.

(e) Funds for protective devices. – At least 1/2 of the funds authorized for and expended under this section shall be available for the installation of protective devices at railway-highway crossings. Sums authorized to be appropriated to carry out this section shall be available for obligation in the same manner as funds apportioned under section 104(b)(1) of this title.

(f) Apportionment. – Twenty-five percent of the funds authorized to be appropriated to carry out this section shall be apportioned to the States in the same manner as sums are apportioned under section 104(b)(2) of this title, 25 percent of such funds shall be apportioned to the States in the same manner as sums are apportioned under section 104(b)(6) of this title, and 50 percent of such funds shall be apportioned to the States in the ratio that total railway-highway crossings in each State bears to the total of such crossings in all States. The Federal share payable on account of any project financed with funds authorized to be appropriated to carry out this section shall be 90 percent of the cost thereof.

(g) Annual report. – Each State shall report to the Secretary not later than December 30 of each year on the progress being made to implement the railway-highway crossings program authorized by this section and the effectiveness of such improvements. Each state report shall contain an assessment of the costs of the various treatments employed and subsequent accident experience at improved locations. The secretary shall submit a report to the Committee on Environment and Public Works of

the Senate and the Committee on Transportation and Infrastructure of the House of Representatives not later than April 1 of each year, on the progress being made by the State in implementing projects to improve railway-highway crossings. The report shall include, but not be limited to, the number of projects undertaken, their distribution by cost range, road system, nature of treatment, and subsequent accident experience at improved locations. In addition, the Secretary's report shall analyze and evaluate each State program, identify any State found not to be in compliance with the schedule of improvements required by subsection (d) and include recommendations for future implementation of the railroad highway [fn1] crossings program.

(h) Use of funds for matching. – Funds authorized to be appropriated to carry out this section may be used to provide a local government with funds to be used on a matching basis when State funds are available which may only be spent when the local government produces matching funds for the improvement of railway-highway crossings.

(i) Incentive payments for at-grade crossing closures. –

(1) In general. – Notwithstanding any other provision of this section and subject to paragraphs (2) and (3), a State may, from sums available to the State under this section, make incentive payments to local governments in the State upon the permanent closure by such governments of public at-grade railway-highway crossings under the jurisdiction of such governments.

(2) Incentive payments by railroads. – A State may not make an incentive payment under paragraph (1) to a local government with respect to the closure of a crossing unless the railroad owning the tracks on which the crossing is located makes an incentive payment to the government with respect to the closure.

(3) Amount of State payment. – The amount of the incentive payment payable to a local government by a State under paragraph (1) with respect to a crossing may not exceed the lesser of –

(A) the amount of the incentive payment paid to the government with respect to the crossing by the railroad concerned under paragraph (2); or

(B) $7,500.

(4) Use of State payments. – A local government receiving an incentive payment from a State under paragraph (1) shall use the amount of the incentive payment for transportation safety improvements.

(j) Bicycle safety. – In carrying out projects under this section, a State shall take into account bicycle safety.

APPENDIX G

La. R.S. 48:757

§ 757. Off-system work; prohibitions; exceptions

A. (1) The Department of Transportation and Development shall perform no work on the parish road system or on any other roads or streets which are not in the state highway system, whether such work is construction or maintenance and whether the work is done at the expense of the state or at the expense of the governing authority of the parishes, except in the following circumstances:

(a) The department shall construct, maintain, and improve roads, whether hard surfaced or otherwise, within state parks and state historic sites as defined in R.S. 56:1684, and connect such sites with existing highways.

(b) The department is authorized to perform work on any off-system bridge which is included as a TIMED project within the provisions of R.S. 47:820.2(B)(1)(b).

(c) The department is authorized to perform work on intersectional improvements on parish roads or municipal streets and to perform work on parish roads or municipal streets for purposes of operational or safety reasons when the parish road or municipal street intersects with a state highway which is programmed for improvement or construction; however, the distance of such off-system work shall conform to AASHTO design standards as adopted pursuant to R.S. 48:35.

(2) Any construction project undertaken by the department as provided in this Subsection shall be in

accordance with the provisions of Subpart A of Part XIII of Chapter 1 of this Title.

B. In an emergency as found and declared by the governor, the governor may expend state funds on parish roads. However, the department may stripe parish roads upon the request of any parish, with the parish bearing the cost of said striping, when in the opinion of the secretary or his designee surplus manpower and equipment are available and the purchase of new equipment in not required.

C. In addition, in instances in which the federal government has established programs pertaining to off-system construction, maintenance, or improvement, the department may participate in said projects and provide necessary matching funds including but not limited to monies in the Transportation Trust Fund. Funding for programs under the provisions of this Subsection shall be subject to the availability and appropriation of funds in excess of the total funds appropriated for the Parish Transportation Fund in Fiscal Year 1994-1995.

APPENDIX H

La. R.S. 48:191

§ 191. State highway system; length; designation

A. There is hereby created and established a system of state highways which shall consist of twelve functional classifications as follows:

(1) Urban highways described as:

(a) Urban-principal arterial-interstate.

(b) Urban-principal arterial-other freeways and expressways.

(c) Urban-principal arterial-other.

(d) Urban-minor arterial.

(e) Urban-collector.

(f) Urban-local.

(2) Rural highways described as:

(a) Rural-principal arterial-interstate.

(b) Rural-principal arterial-other.

(c) Rural-minor arterial.

(d) Rural-major collector.

(e) Rural-minor collector.

(f) Rural-local.

B. The total length of the twelve functional systems shall not exceed sixteen thousand six hundred seventy-five miles, and the additional length permitted herein is

allowed solely for the purpose of adjustments that might become necessary from time to time within the sole discretion of the secretary, working in conjunction with the police juries or municipalities.

C. The location of all highways in the functional systems established hereby may be altered and amended by the secretary to such an extent and in such a manner as may be necessary for the purpose of meeting any requirements in order to obtain federal aid for road construction in Louisiana. The system of state highways created hereby shall consist of the above twelve functional systems and the department shall maintain its current description in conformance with the same.